Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

INTERMOUNTAIN RANCHES, LTD.; MELVIN H. GARDNER; BELVA H. GARDNER; LEE C. ATKIN; and GEORGE L. GARDNER, PETITIONER

vs.

UNITED STATES OF AMERICA;
EDWARD MADIGAN,
Secretary of Agriculture of the United States of America;
F. DALE ROBERTSON,
Chief, Forest Service, United States Dept. of Agriculture;
ROBERT C. JOSLIN,
Reviewing Officer, Deputy Regional Forester,
Intermountain Region;
JOHN P. INMAN,
Forest Supervisor, Humboldt National Forest;
and RENE P. DEMEULE,
District Ranger, Ely Ranger District

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorneys for Appellants

QUESTION PRESENTED

The question presented for review is whether the Forest Service has jurisdiction of the lands in the State of Nevada to abrogate petitioner's grazing rights in said lands, particularly in view of the equal footing doctrine ennunciated by this Court.

IN THE SUPREME COURT OF THE UNITED STATES
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Intermountain Region;
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and RENE P. DEMEULE,
District Ranger, Ely Ranger District

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Intermountain Ranches, pursuant to Rule 14 of the Rules of the Supreme Court of the United States, petitions this Court for a Writ of Certiorari and represents as follows:

(a) All parties to this proceeding appear in the caption of the case.

(b) This petition does not exceed 5 pages; therefore, the table of contents and the table of authorities are not required.

(c) The report of opinion delivered in this case by the Ninth Circuit Court of Appeals is attached hereto.

(d) The Court's review is not a matter of right, but of judicial discretion. There are special and important reasons for the Court exercising its judicial discretion in this matter and accepting jurisdiction.

(i) The United States Court of Appeals for the Ninth Circuit has departed from accepted and usual course of judicial proceedings on the jurisdictional issue by recognizing the Forest Service's right to abrogate grazing permits in spite of the equal footing doctrine.

(ii) No rehearing was requested, and there has been no order granting an extension of time within which to file the petition for a writ of certiorari. This petition is timely.

(iii) No cross-petition has been filed to date.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, U.S.C., Judiciary and Judicial Procedure, Section 1254.

(e) The Constitutional provision involved in the case is the equal footing doctrine.

(f) The Forest Service has abrogated plaintiff's grazing rights in the State of Nevada, and in doing such, the action is

premised on the Forest Service having jurisdiction over said grazing lands in the State of Nevada.

(g) This review of judgment does not involve a judgment of a state court.

(h) This is review of a judgment of the United States Court of Appeals, and petitioner believes that there was no basis for federal jurisdiction over Nevada grazing lands in the court of first instance.

(i) The United States Supreme Court should determine whether the Forest Service has jurisdiction over grazing lands in the State of Nevada.

(j) The appendix contains in the following order the following items

(i) The judgment of the Ninth Circuit Court of Appeals in this matter.

(ii) The judgment of the District Court of Nevada.

(iii) There is no order of rehearing because rehearing was not requested.

(iv) The date of the entry of judgment in (i) is the same as the date of the opinion.

(v) There are no other appended materials.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

Richard C. Cahoon
Robert F. Orton
Milo S. Marsden, Jr.
MARSDEN, ORTON, & CAHOON

Attorneys for Petitioner

March, 1995

FILED
DEC 21 1994
CATHY A. CATTERSON;
CLERK, U.S. COURT
OF APPEALS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERMOUNTAIN RANCHES, LTD.; MELVIN H. GARDNER; BELVA H. GARDNER; LEE C. ATKIN; GEORGE L. GARDNER,	)	NO. 93-15944
	)	D.C. NO. CV-91-00483-ECR
Plaintiffs/Appellants, v.	)	MEMORANDUM*
UNITED STATES OF AMERICA, MIKE ESPY,** Secretary of Agriculture of the United States of America, et al.,	)	
Defendants/Appellees.	)	

Appeal from the United States District Court for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding
Submitted December 14, 1994***
San Francisco, California
Before: TANG, REINHARDT, and RYMER, Circuit Judges

Intermountian Ranches had a permit to graze sheep on federal lands which the Forest Service revoked for failure to comply with the conditions of the permit. Intermountain appealed this decision, and lost, through two levels of administrative review and the district court. We have jurisdiction under 21 U.S.C. 1291, and affirm.

I

The Forest Service found that Intermountain had violated four separate conditions of the permit. The permit itself, and Department of Agriculture regulations, allow the Forest Service to cancel a national forest grazing permit for violation of the conditions of the permit. Intermountain argues that none of the conditions was substantially violated, and that the Forest Service failed to comply with the cancellation procedures outlined in its handbook.

Intermountain's permit incorporated the "allotment management plan," which required it to notify the Forest Service five days before Intermountain intended to move stock onto the grazing lands. Intermountain admits that it "technically" violated this provision, but argues that the Forest Service was not prejudiced. There is no requirement, however, that permits violations prejudice the Forest Service before they justify cancellation.

Intermountain's permit also required it to graze at least 90% of its allotted stock, or obtain consent to a lower number. Intermountain was cited for failure to comply with this requirement in 1987 and 1990. Intermountain argues that its stocking failure in 1990 was justified by a Forest Service letter which warned that due to drought, it might be necessary to reduce the number of sheep graz-

ing on the allotted land. The letter, however, merely warned Intermountain of a contingency; it did not authorize reduced grazing without securing approval. In any event the letter did not excuse Intermountain's failure to graze 90% of its allotment in 1987.

Only sheep "branded as shown in the Application" may be grazed on government land, according to Intermountain's permit. The Forest Service found that Intermountain was grazing sheep under multiple brands, while only one had been listed in its application. Intermountain argues that its application was supplemented to reflect additional brands; however, that did not occur until after the Forest Service's citation for grazing sheep with unauthorized brands.

Intermountain's permit prohibits the leasing or subletting of the permit, and

requires Intermountain to "immediately notify the Forest office in charge of any change in control of base property." Intermountain violated the no-lease provision when it leased its flock, property, and the right to graze sheep on Intermountain"s "U.S. Forest permits" on October 1988. By waiting over two years before notifying the Forest Service of that change in control of the base property, Intermountain argues that because the lease requires compliance with all laws and regulations concerning the sheep, it is void by its terms if it violates a Forest Service regulation. In essence, Intermountain claims that if the lease violates the permit, then it does not violate the permit because the lease is then void. Intermountain is confused. They cannot use the fact that the lease violates the permit as a defense to violating the permit.

II

Intermountain claims that the Forest Service did not comply with its own handbook, which expresses a preference for permit suspension rather than termination, and states that cancellation is seldom justified for first offenses. Even if the handbook were enforceable, but see United State v. Fifty-Three Eclectus Parrots, 685 f.2d 1131, 1135-36 (9th Cir. 1982) (Customs manual not enforceable since it was meant only for in internal use), the Forest Service did not run afoul of its handbook because Intermountain's violations were numerous and prolonged.

Accordingly, the district court correctly determined that the Forest Service's actions were not arbitrary and capricious. Western Energy Co. v. Department of Interior, 932 F.2d 807, 809 (9th Cir. 1991).

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Pursuant to Fed. R. App. P. 43(c)(10) Mike Espy is substituted for Edward Madigan, former Secretary of Agriculture.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX B

ENTERED & SERVED
MAR 29 1993
Clerk, U.S. District
Court, District of
Nevada

FILED
MAR 29 1993
Clerk U.S. District
Court, District
of Nevada

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

INTERMOUNTAIN RANCHES,
LTD., et al.,

v.

UNITED STATES OF AMERICA,
et al.,

JUDGMENT IN A
CIVIL CASE

Case No. CV-N-
91-483-ECR
(PHA)

Decision by Court: This action came to be considered by Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Plaintiffs' Motion for Reversal and/or Remand is denied and Defendants' Cross-Motion to Affirm Administrative Action is granted.

Date: March 29, 1993

CAROL C. FITZGERALD, Clerk

By Joanne Lange, Deputy Clerk

ENTERED & SERVED
MAR 29, 1993
Clerk, U.S. District Court, District of Nevada
By JL, Deputy

FILED
MAR 29, 1993
Carol Fitzgerald, Clerk
By JL, Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

INTERMOUNTAIN RANCHES, LTD.; MELVIN H. GARDNER; BELVA H. GARDNER; LEE C. ATKIN; and GEORGE L. GARDNER,	)	CV-N-91-0483-ECR
Plaintiffs, vs.	)	ORDER
UNITED STATES OF AMERICA; EDWARD MADIGAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA; F. DALE ROBERTSON, CHIEF TO THE FOREST SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; ROBERT C. JOSLIN, REVIEWING OFFICER, DEPUTY REGIONAL FORESTER, INTERMOUNTAIN REGION; JOHN P. INMAN, FOREST SUPERVISOR, HUMBOLDT NATIONAL FOREST; and RENE P. DEMEULE, DISTRICT RANGER, ELY RANGER DISTRICT,	)	
Defendants.	)	

Plaintiffs have filed a Motion for Reversal and/or Remand. (Doc. #20). Defendants have countered with a Cross-Motion to Affirm Administrative Action of Department of Agriculture/Forest Service (Doc. #35). Defendants have filed a reply memorandum in support of their cross-motion and in opposition to Plaintiffs' motion for reversal and/or remand. (Doc. #37). The gravamen of this complaint for judicial review of administrative action concerns the cancellation of a U.S. Forest Service grazing permit. The basis of federal jurisdiction 28 U.S.C. § 1331 (federal question).

Plaintiffs were notified of the violation precipitating this administrative action, and given an opportunity to "show cause" why the action should not be taken. (Doc. #32 at 30). A meeting between the parties took place On October 24, 1990.

(Administrative Record ("AR"), Exh. 22, 135; Exh. 58, 285-321 (transcript)).

Effective immediately, by certified mail dated January 23, 1991, Rene P. Demeule. District Ranger in Ely, Nevada, canceled the term grazing permit held by Intermountain Ranches, Ltd. and Melvin H. Gardner for two allotments used to graze sheep. (Administrative record ("AR"), Exh. 17 at 109). In the first level of appeal, on June 6, 1991, John P. Inman, Forest Supervisor, affirmed District Ranger Demeule's decision. In the second level of appeal, Robert C. Joslin, Deputy Regional Forester, on September 10, 1991, affirmed Supervisor Inman's decision. The Deputy Regional Forester's decision represents the final administrative decision of the U.S. Dept. of Agriculture. 36 C.F.R. 251.87(e)(3).

Since 1976, and the passage of the

Federal Land Policy Act and management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 et seq. (1976), decisions of the Secretary of Agriculture are subject to judicial review. Perkins v. Bergland, 608 F. 2d 803, 805-06 (9th Cir. 1979). 43 U.S.C. U 1701(a)(6) (1976). Judicial review of agency action is subject to the Administrative Procedure Act (APA). 5 U.S.C. U 551 et seq. At the first level of appeal, the Plaintiffs were allowed an "oral presentation." This is considered an informal procedure. 36 C.F.R. § 251.97. These are only permitted at the first level of appeal. 36 C.F.R. § 251.97(d). The oral presentation was held in Elko, Nevada. (Doc. #20 at 5).

Since there is no statutory requirement for a hearing on the record, the substantial evidence test is not applicable. 43 U.S.C. § 706(2)(E). Factual review is therefore

limited to the "arbitrary and capricious standard." 5 U.S.C. § 702(2)(a). Bergland, 608 F.2d at 807 n.10; Stickelman v. United States, 563 F.2d 413, 417 (9th Cir. 1977). The relevant inquiry in determining whether an agency acted arbitrarily is whether the agency "'considered the relevant facts and articulated a rational connection between the facts found and the choice made.'" Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990) (citation omitted). The court's role is to determine if the agency action "has a rational basis or is clearly erroneous." Diamond Ring Ranch, Inc. v. Morton, 591 F.2d 1397, 1407 (10 Cir. 1976).

An agency's interpretation of its governing statute or its own regulations is entitled to considerable deference, but courts are the final arbiters on issues of

statutory and regulatory construction. Fallini v. Hodel, 963 F.2d 275, 277 (9th Cir. 1992); Pyramid Lake, 898 F.2d at 1414; Stamper v. Secretary of Agric., 722 F.2d 1483, 1488 (9th Cir. 1984).

The court must review the whole record and if information is not contained in the administrative record, the court cannot rely upon it in reaching its decision. See Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1176 n.13 (9th Cir. 1982). A court cannot simply substitute its judgment for that of the agency's. See Baker v. United States, 613 F.2d 224 (9th Cir.), cert. denied sub nom. Andrus v. Baker, 449 U.S. 932 (1980).

Priority for permits to graze on national forest lands are issued to those who own lands adjacent to or near the "base

property." 36 C.F.R. § 222.9(iv)(C). It is a system which favors adjacent landowners. Within this system, the Forest Service has very broad discretion to suspend or cancel such a permit, or to modify its terms. 43 U.S.C. § 1752(a); 36 C.F.R. § 222.4. Term permits may be canceled far non-compliance with terms and conditions. 36 C.F.R. § 222.4(a)(4). The terms and conditions to which the Plaintiffs agreed to abide are found on the back of the term grazing permit. (AR, Exh. 25 at 170).

Furthermore, the Ninth Circuit has consistently held that a permit is a revocable privilege. Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983); Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944). As against the United States, a permittee can acquire no right or interest in federal grazing lands. Holland Livestock

Ranch, 655 F.2d 1002, 1005 (9th Cir. 1981). 43 U.S.C. § 1752(h).

The court has carefully reviewed the administrative record. Despite Plaintiffs' protests to the contrary, the court finds evidence of multiple violations over the years and a recalcitrant pattern bent on ignoring Forest Service regulations. The term permit in dispute was issued on May 13, 1986, and was to expire on December 31, 1995. (AR, Exh. 265 at 169).

The Forest Service in 1986, cited a violation for non-use, which is not allowed for the first year a permit is issued. The allotments were not stocked. This was later excused because the base ranch was apparently caught in litigation of some nature. However, Plaintiffs received the first threat of cancellation of their permit on October 26, 1987. (Doc. #32 at 11 n.12,12; AR, Exh. 29

at 167-68; Exh. 50 at 271).

This was followed over the years with further violations of various kinds supported by this record. The Plaintiffs did not notify the Forest Service when the stock was moved onto the range. The allotments were not stocked to at least 90% of the numbers agreed upon. In one year, 1989, the Forest Service was too understaffed to cheek up on the Plaintiffs. (Doc. #32 at 11-12, 19-22). In 1990, matters came to a head. Again, Plaintiffs failed to notify the Forest Service when they were placing livestock on the allotment. This time, accompanied by the Nevada Brand Inspector, the Forest Service made a count. They found multiple violations. There were insufficient numbers of sheep on one allotment. On the other allotment, there were no sheep at all. Whereas only one brand was authorized under

the permit, several brands were noted. Whereas the permit authorized one class of livestock (wet ewes and lambs), the Forest service observed a different class (dry ewes and yearlings). (Doc. #32 at 23 n.23)1.

The allotments were then handled by Phillip Allred, whom the Forest Service assumed was the "manager." The Forest Service had approved a managerial agreement between Allred and Intermountain Ranches dated October 1, 1988. (AR, Exh. 6 at 55; Exh. 37 at 237). One George Swallow, a general partner of Intermountain Ranches, acted as the entity's agent. (Doc. #20 at 5). Some of the sheep bore a brand registered to Allred's relatives in the state of Utah. (AR, Exh. 21 at 131-34; Exh. 22 at 135-141).

The October, 1990, meeting with the Forest Service was attended by Phillip Allred and George Swallow, agent for Intermountain Ranches. At this meeting, George Swallow produced a "sheep lease" effective since October 1, 1988. (AR, Exh. 33 at 185) ("Sheep Lease"). As a consequence, it became apparent to the Forest Service, that the plaintiffs had leased the base property, allotments and permit to Allred.

Leasing has always been prohibited under Forest Service regulations. It is so stated in the Grazing Permit Administration Handbook ("GPAH"), Section 12.23. (Doc. #34, Exh. 1; see also Term permit, Part 2, § 11(e)). The court may take judicial notice of this handbook although it does not have the force of law. The parties do not dispute that Forest Service regulations have always prohibited leasing. The terms of the permit

itself prohibits leasing. (Term permit, Part 2, § 11(e)). In addition, only livestock owned by the permittee is allowed. (Term permit, part 2, § 7(a)). Plaintiffs could not produce a bill of sale from Allred to Plaintiffs.

The Forest Service, quite literally, concluded that the Plaintiffs had pulled the wool over their eyes. The managerial agreement represented a hollow agreement in order to outwardly satisfy Forest Service regulations. The sheep lease, discovered two years after the fact, represented the sub-rosa, true agreement of the parties. Required prior approval had never been sought. (See AR, Exh. 53 at 275).

The "sheep lease" was a flagrant violation of Forest Service history and regulations. The action to cancel a permit is never taken lightly. (AR, Exh. 1 at 02)

(Joslin Decision). "Ownership means the permittee has complete control of the base property and livestock and has not relinquished control in any form such as leasing." (Id. at 01-03). The Forest Service is authorized to establish ownership requirements of base property and livestock. 36 C.F.R. § 222.3(c)(1)(vi)(A). The reviewing officer noted that:

> The lessee is paying for the lease and in no way could be considered a manager receiving monthly payments for his service. It should also be noted, the actions contemplated in this lease arrangement are contradictory to the actions specified in the Management Agreement signed on June 1, 1988 . . . . Under the OWNERS OBLIGATIONS section of this Management Agreement, item 7, it is stated, "Owner agrees to pay manager a management fee which shall be paid monthly by check." This is in direct contradiction to the payment schedule contained in the Sheep Lease, item 7, requiring Mr. Allred to make payments to the Appellants. (Id. at 06).

One other issue remains. Section 16.22

of the GPAH states in pertinent part:

> When a permittee disposes of part or all of the base property on which the permit is based, the Forest Supervisor must provide written notice that the permittee has 1 year to acquire sufficient replacement base property.

(Doc. #20, Exh. A).

To "dispose of" means to "transfer into new hands or to the control of someone else (as by selling or bargaining away); relinquish; to get rid of." Webster's Third New International Dictionary 654 (1976). The language implies a final disposition of base property. The court agrees with the Forest Service's interpretation that these internal procedures pertain to a sale. It is not the intendment of the language to encompass a lease a sa lease is not permitted under another section of the GPAH.

The parties do not dispute that these violations occurred. Plaintiffs, however, base a substantial part of their argument on

the fact that they had a right to rely on a pattern of forgiveness extended to them as a courtesy by the Forest Service.

> Moreover, alleged violations similar to those claimed to have occurred in this case had occurred with other permittees in prior years, leading some permittees to conclude that technical violations would not be dealt with harshly, and particularly that cancellation would not be imposed without prior notice to comply or opportunity to correct deficiencies.

(Doc. #20 at 14).

While the Forest Service hoped that "their leniency would be rewarded" by a curing of defective behavior regularly flouting Forest Service regulations, the Plaintiffs took a different fork in the road. The plaintiffs mistakenly assumed despite many warnings that if the Forest Service gave them an inch, they were entitled to take the extra mile. There is no constitutional right

to leniency and laxity.[1]

Plaintiffs have argued that their transgressions were not "willful." Although "willfulness" includes a subjective component of intent, a finding of willfulness may be founded on objective circumstances where "conduct was so lacking in reasonableness or responsibility that it became reckless or negligent." Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006 9th Cir. 1981) (ruling in the trespass setting) (citation omitted). See cf. National Steel & Shipbuilding Co. v. Occupational Safety & Health Review Comm'n, 607 F.2d 311, 313-14 (9th Cir. 1979). The repetitive nature of

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[1] Interestingly as part of the history in the record, a 1950 letter from the Forest Service to George Swallow, and to other members of the Swallow family, in regard to another permit, that "[a]pparently Swallows think they should be permitted to run stock on these allotments as they want to without any interference from the Forest Service." (AR., Exh. 24 at 277).

Plaintiffs' violations, their secret "sheep lease" which was kept from the Forest Service, objectively supports a reasonable inference of willfulness.

After a review of the record, the court finds that there was a rational basis to revoke Plaintiffs' permit. The Forest Service has the discretion to choose between suspension or cancellation, and the Service chose one alternative over the other. "Unless that choice is arbitrary, courts ordinarily defer to an agency's choice of sanctions." Holland Livestock, 655 F.2d at 1006 (citing Dimond Ring Ranch v. Morton, 531 F.2d 1397, 1407 (10th Cir. 1976)). Nor has the court found any procedural violations. Defendants have not denied Plaintiffs any meaningful opportunity for administrative appeal. See Hinsdale Livestock Co. v. United States, 501 F. Supp. 773, 778 (D. Mont. 1980).

1. IT IS THEREFORE ORDERED that Plaintiffs Motion for Reversal and/or Remand is **DENIED** (Doc. #20), and Defendants' Cross-Motion to Affirm Administrative Action (doc. #37) is hereby **GRANTED**. The Clerk shall enter judgment accordingly.

DATED THIS 26TH DAY OF MARCH, 1993.

/s/ ECR
UNITED STATES DISTRICT JUDGE